Supreme Court, U.S.
FILED
JAN 3 2002
CLERK

(3)

No. 01-790

In The Supreme Court Of The United States

STATE OF IOWA, et al.,
Petitioners,

v.

ROYCE L. ANTHONY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF OF THE STATES OF OHIO, INDIANA, LOUISIANA, NEBRASKA, NEVADA, OKLAHOMA, TEXAS AND UTAH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

BETTY D. MONTGOMERY
Attorney General of Ohio
DAVID M. GORMLEY*
State Solicitor
**Counsel of Record*
RICHARD N. COGLIANESE
ROBERT L. STRAYER
Assistant Solicitors
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

Counsel for *Amici* States

15 pp

STEVE CARTER
Attorney General
State of Indiana

RICHARD P. IEYOUB
Attorney General
State of Louisiana

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

JOHN CORNYN
Attorney General
State of Texas

MARK L. SHURTLEFF
Attorney General
State of Utah

QUESTION PRESENTED

Whether application of the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. 207(a)(1), to the States violates the Tenth Amendment.

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STATEMENT OF *AMICI* INTEREST

The State of Ohio and seven other amici States have an abiding, deeply entrenched interest in preserving areas of State sovereignty from encroachment by the federal government. The decision of the Iowa Supreme Court chips away at that vital state interest. At the heart of the Tenth Amendment is the preservation of the constitutional balance of power between the States and the federal government. The forced imposition of federally-designed wage and hour requirements on the States is not consistent with that proper balance.

Implicit in the Iowa Supreme Court's decision in this case is the view that the Tenth Amendment is no bar to federal enforcement of the Fair Labor Standards Act against the States as employers. Yet that view fails to account for the role of the States as dual sovereigns in our federal system, and necessarily forces the States to comply with sometimes-costly federal requirements with which they and their elected leaders may strongly disagree.

Ohio and other States have an overriding interest in the management and compensation of their own employees. States and their political subdivisions employed 18.3 million people as of September 2001. Until 1985, the States were free to set the terms and conditions of employment for state workers, and the States could do so in ways different from practices mandated by the federal government's Fair Labor Standards Act ("FLSA"). When this Court, however, declared that the States and their subdivisions were subject to the FLSA, the U.S. Department of Labor issued a flurry of regulatory requirements directed solely to the States. Those State-specific regulations have effectively stripped the States of one of the most basic functions of sovereignty: the States' authority to define job duties and compensation policies for their own employees.

Compliance with the FLSA and its attendant regulations has imposed significant costs on the States. Some States have been forced to hire labor specialists and additional attorneys in order to make sure that minor personnel decisions do not run afoul of the FLSA's burdensome regulatory scheme. As is true of Iowa in this case, when the States err in their good faith attempts to comply with the federal statute and its related regulations, they face potentially catastrophic judgments. See, e.g., *Turner v. City of Philadelphia*, 262 F.3d 222 (3rd Cir. 2001) (plaintiffs seeking $1.4 million in overtime pay and $1.4 million in liquidated damages); *Reich v. Southern Maryland Hosp.*, 43 F.3d 949 (4th Cir. 1995) (overturning an award of $4.2 million in back pay and liquidated damages); *Naum v. City of New York*, 1997 U.S. Dist. LEXIS 13024 (S.D.N.Y. Aug. 28, 1997) (plaintiffs seeking $25 million in damages).

The States, like the federal government, ought to be free to decide for themselves the best ways for retaining quality employees and for defining their duties. The States ought not face onerous federally-imposed financial burdens tied to the States' own employment practices. We therefore urge the Court to review the judgment below.

REASONS FOR GRANTING THE PETITION

This Court has of course gone back and forth on the very Tenth Amendment issue that this case raises. As the petitioners readily acknowledge, the Iowa Supreme Court's decision below is consistent with this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (applying the FLSA's wage-and-hour requirements to a local political subdivision of a State).

Yet real-world experience in the States since *Garcia* was decided has shown that the FLSA and its implementing

regulations are ill-suited to the employment relationship that exists between the States and their workers. And the kind of public sector regulations that the federal government has imposed in the wake of *Garcia* have only heightened the burdens on the States and have further diminished the authority of the States to manage their own affairs in ways that their own policy-makers think best.

In light of post-*Garcia* decisions from this Court reevaluating the kind of relationship that does and should exist between the States and the federal government under our Constitution, *Garcia* and its conclusion that the FLSA should apply to the States now merits another look. And in addition, because the Iowa Supreme Court erred in holding that a State can waive the protections afforded to the States by the Tenth Amendment, Iowa's petition should be granted.

The Tenth Amendment Bars Congress From Imposing The FLSA's Requirements On The States.

A. The FLSA Imposes Significant Burdens On State And Local Governments.

Since this Court's decision in *Garcia*, Congress and the U.S. Department of Labor have developed employment-related regulations that apply to the States alone. Those federal requirements now force the States to jump through a confusing mix of hoops covering the most basic employer-employee questions that the States and their political subdivisions encounter day to day, and those regulations have in turn spawned much litigation about the obligation of the States to pay their workers according to federally-dictated standards.

The FLSA, as originally written, applied only to private employers. The FLSA was expanded to cover the

States and their political subdivisions through amendments enacted in 1966 and 1974. *See Garcia*, 469 U.S. at 533. The U.S. Department of Labor ("DOL") promulgates regulations to enforce the act. 29 U.S.C. 207.

Several regulations impose special obligations on the States and their political subdivisions as employers. For example, though public employees who work in fire protection or law enforcement are exempted from the FLSA's reach under 29 U.S.C. 207(k), Congress has given the DOL the power to decide how many hours these public safety employees may work before the States must pay overtime wages. Congress has also developed special rules for the States and their political subdivisions concerning so-called "compensatory time" paid to some employees in lieu of cash. 29 U.S.C. 207(o). The statute also contains special public-sector-only definitions for elected officials, political appointees and state legislative branch employees. 29 U.S.C. 203(e)(2)(C).

These provisions and others have generated considerable litigation by state employees against the States and their political subdivisions. For instance, the scope of the FLSA's firefighter exemption is unclear. See, e.g., *Horan v. King County*, 740 F. Supp. 1471 (W.D. Wash. 1990) (holding that employees who receive training to enter burning buildings are not necessarily fire personnel); *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991) (holding that employees who receive fire rescue training are automatically covered under the exemption, regardless of their actual duties).

Similarly, a DOL regulation interpreting the same firefighter exemption has led to confusion in the lower courts. Examining that regulation, which says that any exempt firefighting or emergency-rescue employees must be persons who are "regularly dispatched to fires, crime scenes,

riots, natural disasters and accidents," 29 C.F.R. 553.215(a), some courts have concluded that public employees' time spent responding to all accidents can be considered, see, e.g., *Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir.), *cert. denied*, 522 U.S. 994 (1997), while others have interpreted the federal government's regulation as applying only to emergency runs tied to automobile accidents, see, e.g., *O'Neal v. Barrow County Bd. of Comm'rs*, 980 F.2d 674 (11th Cir. 1993). One court has even wrestled recently with the question whether municipalities that enlist some of their employees to perform both EMS and firefighting duties lose their FLSA exemption entirely. See *Adams v. City of Norfolk*, 2001 U.S. App. LEXIS 26034 (4th Cir. Dec. 6, 2001).

Cash-strapped States and their political subdivisions must tailor employment in their police, fire, and EMS programs specifically to the FLSA. Failure to do so can subject them to ever-increasing liability under the federal statute and its related regulations. Instead of spending funds on making sure that these professionals receive proper training with adequate equipment, State and local governments are forced to spend time and money determining how their employees spend their day, the types of emergency calls to which they respond and what they do when they get there.

B. The FLSA's Regulations Improperly Commandeer State Resources.

The Tenth Amendment consists of a simple yet profound statement. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Proper Tenth Amendment analysis distinguishes between laws of general applicability and laws that regulate the States *qua* States. See, e.g., *Printz v. United States*, 521 U.S. 898

(1997); *New York v. United States*, 505 U.S. 144 (1992). By enacting state-specific and government-specific regulations to enforce the FLSA, the DOL has intruded on the very basic authority of the States and their political subdivisions to hire and manage their own workforces. In the wake of this Court's *Garcia* ruling, federal regulators now dictate many of the working conditions that the States themselves ought to be free to set in our federal system, and that federal interference with state sovereignty extends down to the most local of government functions, like police and fire protection services.

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court of course held that the FLSA could not be applied to the States and their subdivisions. The Court concluded in that case that one of the most essential attributes of state sovereignty is the "States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime." *Id.* at 845.

Garcia undid that holding nine years later, when the Court found that the protection afforded the States by the Tenth Amendment is "one of process rather than one of result." *Garcia*, 469 U.S. at 554. Yet decisions from this Court over the past decade suggest that the Court's *Garcia* decision undervalued the States' interests in managing their own affairs.

In *New York v. United States*, 505 U.S. 144 (1992), the Court struck on Tenth Amendment grounds provisions of a law that required States to either regulate the disposal of nuclear waste or take title to that waste. *Id.* at 174-75. By attempting to regulate the States directly, Congress had gone too far, according to the Court, for the Constitution gave

Congress the power to regulate individuals, not States. *New York*, 505 U.S. at 166.

Likewise in *Printz v. United States*, 521 U.S. 898, 935 (1997), the Court again found that Congress had trampled on the rights of the States as independent sovereigns. By commanding state officials to perform background checks on gun purchasers, Congress had improperly blurred the lines between the state and federal governments. "By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Id.* at 930.

When Congress commandeers a State's bureaucracy in order to enforce federal law, Congress is able to make an easy political decision. Namely, Congress holds itself out as the problem solver while States foot the bill.

The FLSA and its regulatory scheme represent a direct regulation on the States and their subdivisions. States and their political subdivisions employ 18.3 million people. Through the FLSA, Congress has dictated directly how the States and their political subdivisions pay their employees.

States and their subdivisions are now forced to spend years and millions of dollars litigating whether specific duties might render FLSA exemptions void. For example, the City of Norfolk was sued by more than 230 current and former employees in a case that revolved around whether the City properly claimed that these employees were subject to the fire protection exemption under the FLSA. See *Adams v. City of Norfolk*, 2001 U.S. App. LEXIS 26034 (4th Cir. Dec. 6, 2001). These certified firefighters claimed that the City of Norfolk destroyed their firefighter exemption because the workers also are required to provide emergency medical

services as part of their job duties. The FLSA regulations remove the firefighter exemption if employees work more than 20% of their workweek in non-firefighter-related duties. 29 C.F.R. 553.212(a).

The City of Norfolk was required to examine the work performed by these employees, and the court then had to determine whether that work was incidental to firefighter duties. After several years of expensive litigation, the court determined that the EMS duties were incidental to the employees' firefighter duties. As a result, Norfolk was not subject to two years of overtime wages. Unfortunately, however, Norfolk wasted precious resources defending this case. These resources could have been better spent purchasing new equipment or getting better training for its firefighters and EMS crews.

The City of Cincinnati has also undergone lengthy litigation over how it chooses to organize its police force. Beginning in 1981, Cincinnati started a canine unit with twelve officers who volunteered for the extra duties. These officers were and are responsible for caring for the canines, and they keep the dogs at home when the animals are not working. *Brock v. City of Cincinnati*, 236 F.3d 793 (6th Cir. 2001).

In 1995, the Fraternal Order of Police and the City of Cincinnati included a provision in their collective bargaining agreement concerning the way that police officers would be paid for their off-duty dog-handling duties. After negotiations ended on the 1997-98 contract, the twelve canine officers sued under the FLSA, claiming that they were entitled to two years of back wages for their dog-handling duties. The trial court ruled in favor of ten plaintiffs. The Sixth Circuit reversed, finding that the collective bargaining agreement allowed for officers to be paid for 17 minutes of dog care per day at a standard rate of pay. The Court further

found that the FLSA exemption for police officers should have applied. That exception allows a city to require a police officer to work 43 hours per week without overtime pay if the city adopted a seven-day work period. *Id.* at 810, *citing* 29 C.F.R. 553.230.

All of this happens because the federal government is now allowed to decide how the States and their subdivisions must manage and pay their employees. Cincinnati could have better used its resources focusing on police projects. Instead, it was forced to litigate overtime pay for twelve canine officers for five years. *Garcia* merits a fresh look in light of recent decisions and in light of the burdens borne by the States under the FLSA.

CONCLUSION

For the foregoing reasons, the *amici* States urge the Court to grant the petition.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
DAVID M. GORMLEY*
State Solicitor
**Counsel of Record*
RICHARD N. COGLIANESE
ROBERT L. STRAYER
Assistant Solicitors

January 2002